

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

APRIL 28, 2000

IN RE:

**APPLICATION OF MEMPHIS NETWORKX, LLC,
FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO PROVIDE
INTRASTATE TELECOMMUNICATIONS
SERVICES AND JOINT PETITION OF MEMPHIS
LIGHT GAS & WATER DIVISION, A DIVISION
OF THE CITY OF MEMPHIS, TENNESSEE
("MLGW") AND A&L NETWORKS-TENNESSEE,
LLC ("A&L"), FOR APPROVAL OF AGREEMENT
BETWEEN MLGW AND A&L REGARDING JOINT
OWNERSHIP OF MEMPHIS NETWORKX, LLC.**

DOCKET NO. 99-00909

**PRE-HEARING ORDER REFLECTING ACTION TAKEN AT
PRE-HEARING AND STATUS CONFERENCES HELD ON
MARCH 24, 2000, MARCH 29, 2000 AND APRIL 5, 2000
AND DECISIONS ON MOTIONS IN LIMINE AND
OBJECTIONS TO PRE-FILED TESTIMONY AND EXHIBITS**

This matter is before the Tennessee Regulatory Authority ("Authority") upon the Application of Memphis Networkx, LLC ("Memphis Networkx" or the "Applicant") for a certificate of Public Convenience and Necessity to provide intrastate intraLATA local exchange telecommunications services in Tennessee. In conjunction with the Application, Memphis Light, Gas & Water Division, a division of the City of Memphis and A&L Networks-Tennessee, LLC. ("Joint Petitioners") seek approval of the Operating Agreement of Memphis Networkx, pursuant to Tenn. Code Ann. § 7-52-103(d). At a regularly scheduled Authority Conference held on December 20, 1999, the Authority appointed General Counsel or his designee to act as Pre-Hearing Officer for the purpose of preparing this matter for

hearing, including hearing preliminary matters prior to the hearing and establishing a procedural schedule to completion.

Pursuant to Notice, a Pre-Hearing Conference was held on February 17, 2000 and February 22, 2000 for the purpose of preparing this matter for a hearing, including developing a list of issues to be addressed in this proceeding and establishing a procedural schedule to completion. During the Pre-Hearing Conference, the parties agreed to a procedural schedule which included proposed hearing dates of March 29 and 30, 2000. The agreed procedural schedule also provided for the conduct of discovery and the submission of pre-filed testimony. On March 14, 2000, the Directors of the Authority unanimously approved the Report and Recommendation reflecting the activity at the two-day Pre-Hearing Conference. By subsequent agreement between the parties the dates for filing discovery requests, discovery responses, stipulations and pre-filed testimony were extended.

Intervenors, NEXTLINK, Tennessee, Inc. ("NEXTLINK") and the Tennessee Cable Telecommunications Association ("TCTA") submitted data requests to Memphis Networkx on March 1, 2000. Memphis Networkx submitted its data requests to Time Warner Telecom, Time Warner Communications and the TCTA on March 1, 2000. Memphis Networkx responded to the Intervenors' data requests on March 9, 2000. Time Warner Telecom, Time Warner Communications and the TCTA filed their responses to Memphis Networkx's data requests on March 9, 2000. Direct Testimony and Exhibits were filed by the TCTA on March 16, 2000. Rebuttal Testimony and Exhibits were filed by the Memphis Networkx and Memphis Light Gas & Water Division on March 23, 2000.

On March 16, 2000, NEXTLINK requested that the following nine (9) "employees" of the Applicant and Joint Petitioners be made available for cross-examination at the Hearing: Alex Lowe, Allan Long, Michael Kissell, Wade Stinson, Andrew Kinross, Gene Crawford,

Mark Smith, Herman Morris and Larry Thompson. On March 17, 2000, Time Warner Telecom, Time Warner Telecommunications and the TCTA filed a Request to Conduct Discovery Depositions seeking permission to depose John McCullough, Wade Stinson, Larry Thompson, Joel Halverson and Alex Lowe. On March 22, 2000, Time Warner Telecom, Time Warner Telecommunications and the TCTA requested the Authority to subpoena the records custodians of Memphis Light Gas & Water Division, A & L Networks and Memphis Networx.

March 24, 2000 Status Conference

Pursuant to Notice via telephone on March 23, 2000, a Status Conference was held on March 24, 2000, with the Pre-Hearing Officer presiding, for the purposes of acting on the following filings made by the parties: (1) Request by NEXTLINK for the Authority to subpoena witnesses; (2) Request by Time Warner Telecom, Time Warner Communications and the TCTA to conduct discovery depositions; (3) Request by Time Warner Telecom, Time Warner Communications and the TCTA for the Authority to subpoena the records custodians of Memphis Light Gas & Water, A & L Networks and Memphis Networx and (4) Correspondence and Response of the Applicant and Joint Petitioners to the requests to depose and subpoena witnesses.

Parties in Attendance

In attendance at the Status Conference on March 24, 2000 were the following parties:

Memphis Networx, LLC; Memphis Light Gas & Water Division; A&L Networks-Tennessee, LLC – **D. Billye Sanders**, Esquire, Waller Lansden Dortch & Davis, 511 Union Street, Suite 2100, Nashville, TN 37219-8966 and **John Knox Walkup**, Esquire, Wyatt, Tarrant & Combs, 511 Union Street, Suite 1500, Nashville, TN 37219-1750;

NEXTLINK Tennessee, Inc. (“NEXTLINK”)– **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South, L.P. ("Time Warner Communications") and the Tennessee Cable Telecommunications Association ("TCTA") – **Charles B. Welch, Jr.**, Esquire and **Jon F. Minkoff**, Esquire, Farris, Mathews, Branan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219;

Counsel for BellSouth Telecommunications, Inc. and for the TDS TELECOM Companies were notified of this Status Conference and advised the Pre-Hearing Officer that they would not be in attendance but wanted to be advised as to action taken at the Status Conference.

Intervenors' Requests to Depose and Subpoena Witnesses

NEXTLINK stated during the Status Conference that its request to call the named employees as witnesses at the Hearing was primarily for the purpose of discussing some of the documents NEXTLINK had obtained during discovery. NEXTLINK stated that the procedural schedule did not allow sufficient time to depose these witnesses prior to hearing and requested that, if necessary, the Authority issue subpoenas to secure the attendance of these witnesses. Time Warner stated that the requested depositions were needed to address inconsistencies in certain information provided in Memphis Networx's Application and in Memphis Networx's subsequent responses to data requests. The subpoenas for the records custodians were for production and authentication of records at the Hearing. The Applicant and the Joint Petitioners opposed the requests for depositions and for witnesses at the Hearing and asked for clarification as to those records for which Time Warner sought authentication.

During the March 24th Status Conference, the Intervenors acknowledged that their requests overlapped as to some witnesses. In addition, the Intervenors advised the Pre-Hearing Officer that if the parties could meet to authenticate the records involved in this case while reserving objections as to the relevancy of the records, Time Warner would withdraw

its request to subpoena the records custodians. On March 23, 2000, the Applicant and Joint Petitioners had filed rebuttal testimony from two persons, Wade Stinson and John McCullough, both of whom the Intervenors wished to depose. As a result of the foregoing and through further discussions between the Intervenors and the Pre-Hearing Officer, the requests for testimony were narrowed and the Intervenors agreed to reduce the original number of nine (9) witnesses requested to appear at the hearing and of five (5) witnesses requested for deposition to a total of two (2) witnesses: Alex Lowe and Larry Thompson.

The Intervenors proposed that Mr. Lowe and Mr. Thompson could be either deposed in advance of the Hearing or cross-examined at the Hearing. The Applicant and Joint Petitioners maintained their opposition to both options, asserting that any testimony these two (2) witnesses could offer would be irrelevant to the issues or duplicative of testimony previously filed by other witnesses in this matter. Because the Applicant and Joint Petitioners filed their rebuttal testimony one day before the Status Conference, the counsel for the Applicant and Joint Petitioners suggested that the Intervenors review that testimony to determine whether the testimony of Mr. Lowe and Mr. Thompson would be required.

The Pre-Hearing Officer determined that the Intervenors seeking the testimony of Mr. Lowe and Mr. Thompson should file with the Pre-Hearing Officer by 4:30 p.m. on Monday, March 27, 2000, a list of the inconsistencies they believed existed between the Application, the Applicant's responses to data requests and the Applicant's pre-filed testimony. Additionally, the Pre-Hearing Officer determined that the Status Conference should reconvene on March 28, 2000, at which time the Pre-Hearing Officer would consider the information filed by the Intervenors, hear the response of the Applicant and Joint Petitioners and then determine whether to grant the Intervenors' request to obtain the testimony of Alex Lowe and Larry Thompson.

During the March 24th Status Conference the Pre-Hearing Officer extended the deadline for the filing of Applicant and Joint Petitioners' Brief from March 24 to March 27, 2000. Because of the status of the disputes between the parties and of the need for the resolution of other matters important to the preparation of this case for a hearing, the Pre-Hearing Officer determined that the matter was not ready to be heard by the Authority and ruled that the Hearing would not take place on March 29 and March 30, 2000. The Pre-Hearing Officer did not reschedule the Hearing, but proposed the dates of April 4 and 5 or April 12, 13 and 14 as possible dates depending on the Authority's calendar.

March 29, 2000 Status Conference

On March 27, 2000, it was determined that the Status Conference should reconvene on March 29 rather than March 28, 2000. On March 27, all parties were duly notified of this change.

Parties in Attendance

In attendance at the continuation of the March 29th Status Conference were the following parties:

Memphis Networx, LLC; Memphis Light Gas & Water Division; A&L Networks-Tennessee, LLC – **D. Billye Sanders**, Esquire, Waller Lansden Dortch & Davis, 511 Union Street, Suite 2100, Nashville, TN 37219-8966 and **John Knox Walkup**, Esquire, Wyatt, Tarrant & Combs, 511 Union Street, Suite 1500, Nashville, TN 37219-1750;

NEXTLINK Tennessee, Inc. ("NEXTLINK") – **Henry Walker**, Esquire, Boulton, Cummings, Connors & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South, L.P. ("Time Warner Communications") and the Tennessee Cable Telecommunications Association ("TCTA") – **Charles B. Welch, Jr.**, Esquire and **Jon F. Minkoff**, Esquire, Farris, Mathews, Branan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219;

BellSouth Telecommunication, Inc. – **Guy Hicks**, Esquire, 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300.

Counsel for the Intervenor, TDS TELECOM Companies, was notified of the continuation of the Status Conference and advised the Pre-Hearing Officer that he would not be in attendance but wanted to be advised as to action taken at the Status Conference.

Intervenors' Request to Depose Larry Thompson and Alex Lowe

The Intervenors filed documentation with the Authority on March 27, 2000 in support of their request to depose or cross-examine witnesses, Larry Thompson and Alex Lowe. The Pre-Hearing Officer reviewed this documentation in advance of the Status Conference and permitted the parties to present oral arguments. After extensive argument, the Pre-Hearing Officer determined that the Intervenors would be allowed to depose the two (2) witnesses for the purpose of presenting their testimony at the Hearing.

The Pre-Hearing Officer determined that the Intervenors made a sufficient showing to demonstrate that certain testimony of Larry Thompson and Alex Lowe would be relevant to the issues in this proceeding and would not be duplicative of previously filed testimony. As to Larry Thompson, Senior Vice President of Operations for Memphis Light Gas & Water, the Intervenors demonstrated that Mr. Thompson was associated with the coordination of activities between MLG&W and Memphis Networx and had knowledge of certain construction operations of MLG&W which may have involved the Applicant, Memphis Networx. The Pre-Hearing Officer further found that the Intervenors provided a sufficient showing to warrant obtaining the testimony of Alex Lowe of A&L Underground Inc. The documentation provided by the Intervenors demonstrated that Mr. Lowe could have information concerning the operations of A&L Underground prior to the filing of Application

by Memphis Network. To that end, the Pre-Hearing Officer determined that the testimony of Alex Lowe could be relevant to the issues in this docket.

The Pre-Hearing Officer determined that Mr. Lowe and Mr. Thompson should be deposed in advance of the Hearing and that the depositions would be taken for the purposes of presenting testimony at the Hearing. All parties were advised to raise all objections to any questions or proffered exhibits during the depositions; such objections would be resolved by the Pre-Hearing Officer prior to the Hearing. Counsel for the Applicant and Joint Petitioners requested that a pre-hearing conference be held in advance of the depositions for the purpose of resolving motions in limine as to the subject matter of the depositions and to resolve any objections to exhibits and pre-filed testimony. At the request of the Applicant and Joint Petitioners, the Pre-Hearing Officer made himself available to attend the depositions of Mr. Lowe and Mr. Thompson to rule on any objections that are raised by the parties during such depositions. The Pre-Hearing Officer determined that the parties should mutually agree to a date and time to conduct the depositions of Mr. Lowe and Mr. Thompson and to coordinate with the Pre-Hearing Officer in scheduling the depositions.

Other Action Taken at March 29th Status Conference

During the March 29th Status Conference the Pre-Hearing Officer stated that the Hearing would take place on April 13 and 14, 2000. To facilitate the expeditious presentation of evidence at the time of the Hearing and to address the concerns raised by the Applicant and Joint Petitioners as to having their witnesses prepared to address specific documents, the Pre-Hearing Officer ordered that the parties either provide to each other a list of exhibits to be presented at the Hearing or make those exhibits available for copying or inspection by 11:00 A.M., Friday, March 31, 2000. The Pre-Hearing Officer stated that a Pre-Hearing Conference to address objections to pre-filed testimony and exhibits and any motions in limine as to the

testimony of witnesses would be held in advance of the depositions of Mr. Lowe and Mr. Thompson. The parties were also directed to file objections and motions in limine prior to this Pre-Hearing Conference. The dates and times for the Pre-Hearing Conference and the filing of objections and motions in limine would be determined by the agreed upon date for the depositions. Additionally, the parties were encouraged to continue to seek a resolution to the request of Time Warner Telecom, Time Warner Communications and TCTA to subpoena the records custodians of MLG&W, A&L Networks and Memphis Network through a stipulation as to the authenticity of such records.

Subsequent to the March 29th Status Conference, the Pre-Hearing Officer was contacted by counsel for the Applicant and the Joint Petitioners and was advised that Mr. Lowe and Mr. Thompson would be available for depositions on Thursday, April 6, 2000. The Intervenor was advised of the date for the depositions. A schedule was then provided to all parties for the filing of objections and motions in limine on April 3, 2000 and for the Pre-Hearing Conference on April 5, 2000.

On April 3, 2000 the Authority was contacted by counsel for the International Brotherhood of Electrical Workers, Local 1288 ("IBEW") and advised that the IBEW wanted to intervene and participate in the hearing in this matter. Counsel for the IBEW then filed a Petition to Intervene with the Authority on April 4, 2000.

April 5, 2000 Pre-Hearing Conference

Pursuant to Notice from the Authority a Pre-Hearing Conference was held in this matter on April 5, 2000, for the purpose of considering: (1) the Petition to Intervene filed by the International Brotherhood of Electrical Workers, Local 1288, (2) Motions in Limine to testimony of witnesses, (3) Objections to pre-filed testimony and (4) Objections to exhibits.

Parties in Attendance

In attendance during the Pre-Hearing Conference on April 5, 2000 were the following parties:

Memphis Networkx, LLC ("Memphis Networkx" or the "Applicant"), Memphis Light Gas & Water Division; A&L Networks-Tennessee, LLC (the "Joint Petitioners") – **D. Billye Sanders**, Esquire, Waller Lansden Dortch & Davis, 511 Union Street, Suite 2100, Nashville, TN 37219-8966 and **John Knox Walkup**, Esquire, Wyatt, Tarrant & Combs, 511 Union Street, Suite 1500, Nashville, TN 37219-1750;

NEXTLINK Tennessee, Inc. ("NEXTLINK") – **Henry Walker**, Esquire, Boulton, Cummings, Conners & Berry, 414 Union Street, #1600, P.O. Box 198062, Nashville, TN 37219-8062;

Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South, L.P. ("Time Warner Communications") and the Tennessee Cable Telecommunications Association (the "TCTA") – **Charles B. Welch, Jr.**, Esquire and **Jon F. Minkoff**, Esquire, Farris, Mathews, Branan, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219;

BellSouth Telecommunication, Inc. ("BellSouth") – **Guy Hicks**, Esquire, 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300;

International Brotherhood of Electrical Workers, Local 1288 ("IBEW") – **Lee J. Bloomfield**, Esquire, Allen, Godwin, Morris, Laurenzi & Bloomfield, P.C., 200 Jefferson, Suite 1400, Memphis, TN 38103.

IBEW's Petition to Intervene

On April 4, 2000, the IBEW filed a Petition to Intervene in this docket. The Pre-Hearing Officer considered the IBEW's Petition at the April 5, 2000 Pre-Hearing Conference and, after hearing comments from the parties, granted the Petition to Intervene. The IBEW's participation is limited, pursuant to Tenn. Code Ann. § 4-5-310(c), but includes making a brief statement to the Authority at the Hearing. After considering subsequent filings by the parties, the Pre-Hearing Officer entered an Order on April 25, 2000 reflecting the action taken on the IBEW's Petition and further permitting the IBEW to conduct cross-examination of witnesses.

Motions in Limine

On April 3, 2000, Memphis Networkx filed a Motion in Limine to exclude testimony or evidence or any further discovery regarding certain matters during the depositions of Larry Thompson and Alex Lowe. On April 3, 2000, Time Warner Telecom, Time Warner Communications and the TCTA filed a Motion in Limine as to any evidence relating to the proposed AOL/Time Warner merger or the cross subsidization of any Time Warner affiliate. The Pre-Hearing Officer determined to hold the Motions in Limine in abeyance rather than rule to exclude specific questions or areas of testimony based on relevancy objections prior to the depositions. The Pre-Hearing Officer stated that a ruling would be made on the Motions in Limine following the depositions on April 6, 2000.

Parties' Objections to Prefiled Testimony and Exhibits

On April 3, 2000, the Applicant and Joint Petitioners filed objections to the exhibits filed with the testimony of William J. Barta and to portions of Mr. Barta's testimony. The Applicant and Joint Petitioners also objected to the list of documents filed on March 31, 2000 by the Intervenors for use at the Hearing.

On April 3, 2000, Time Warner Telecom, Time Warner Communications and the TCTA filed objections to the Rebuttal Testimony of J. Maxwell Williams, Ward Huddleston, Jr., Wade Stinson and John McCullough and a Motion to Strike specific testimony of those witnesses. At the Pre-Hearing Conference on April 5, 2000, the parties orally responded to each other's objections.

Objections to Time Warner's Requests for Production of Documents at Depositions

The Pre-Hearing Officer was not provided copies of requests served on the Applicant and Joint Petitioners for document production during the depositions of Alex Lowe and Larry

Thompson. On the morning of the Pre-Hearing Conference, the Pre-Hearing Officer, per his request, received copies of Time Warner's Requests to Produce Documents at the depositions of Alex Lowe and Larry Thompson served on the Applicant and Joint Petitioners on March 31, 2000. On April 3, 2000, the Applicant and the Joint Petitioners filed objections to the requests to produce documents at the depositions. As to **Request No. 1**, the Applicant and Joint Petitioners asserted that the request was over burdensome, that some of the documents requested have already been produced and that the request violated the discovery schedule established in this proceeding. As to **Request No. 2**, the Applicant and Joint Petitioners asserted that the request violated the discovery schedule established in this proceeding. As to **Request No. 3**, the Applicant and Joint Petitioners stated that any such document that had not previously been produced was irrelevant or constituted attorney work product.

Following the comments by the parties, the Pre-Hearing Officer ruled that Mr. Lowe and Mr. Thompson should bring any documents in their possession pertaining to these proceedings to the depositions and that Time Warner would have an opportunity during the depositions to inquire about any other documents in existence. The Pre-Hearing Officer's ruling in this regard was rendered moot when the depositions of Alex Lowe and Larry Thompson did not go forward on April 6th as scheduled.

April 6, 2000 Depositions of Larry Thompson and Alex Lowe

On the morning of April 6, 2000 the parties, the witnesses, Larry Thompson and Alex Lowe, and the Pre-Hearing Officer appeared in the Hearing Room of the Authority for the depositions of Mr. Thompson and Mr. Lowe. Counsel for Time Warner requested that the rule of sequestration of witnesses be imposed in as much as the depositions were being taken for purposes of hearing testimony. At that time, counsel for the Applicant and Joint Petitioners designed Mr. Thompson as the corporate representative for MLG&W, Ward

Huddleston as the corporate representative for Memphis Network and Alex Lowe as the corporate representative for A&L. After some discussion, the Applicant and Joint Petitioner proposed that the witnesses, Mr. Thompson and Mr. Lowe, appear at the Hearing to present live testimony rather than give their depositions. The Intervenor Time Warner and NextLink agreed to the offer and the depositions were cancelled.

During the time that had been set aside for the depositions, the Pre-Hearing Officer facilitated discussions between the parties for the purpose of entering into stipulations of fact and the authenticity of documents. Although there was dialogue between the parties no stipulations were reached.

Continuance of Hearing to May 1, 2000

The cancellation of the depositions resulted in the addition of two witnesses to the Hearing. Further, the parties were unable to enter into stipulations of fact or the authenticity of records during the time set aside for such on April 6, 2000. As a result, the Pre-Hearing Officer notified the parties of April 7, 2000 that the Hearing scheduled for April 13 and 14, 2000, would have to be rescheduled to allow the additional time needed beyond two days. The Pre-Hearing Officer's decision was memorialized in an Order issued on April 10, 2000, which was appealed by the Applicant and Joint Petitioners. At the request of the Applicant and Joint Petitioners, the Directors of the Authority heard the appeal at a regularly scheduled Authority Conference on April 11, 2000. After considering the argument of the parties, the Directors voted two to one to continue the Hearing and rescheduled the Hearing for the week of May 1, 2000.

PRE-HEARING OFFICER'S RULINGS
ON MOTIONS IN LIMINE AND OBJECTIONS

After the cancellation of the depositions on April 6, 2000 the Pre-Hearing Officer advised the parties that he would review the filings of the parties, consider the oral arguments and issue an order reflecting his rulings on the motions in limine and the objections to pre-filed testimony and exhibits. The Pre-Hearing Officer's rulings are set forth in the text that follows.

Discussion

The Motion in Limine and Objections filed by the Applicant and Joint Petitioners are based almost entirely on the argument that the documentation and testimony in question are not relevant to the issues in this case. In their Memorandum of Law in support of the Motion in Limine, the Applicant and Joint Petitioners argue:

The Pre-Hearing Officer and the Tennessee Regulatory Authority should exclude all evidentiary items except those relating to (1) whether the Applicant meets the statutory requirement (2) whether the terms of the agreement actually executed by the party should be approved with or without conditions. Among those items to be excluded would be: (1) notes, memoranda, correspondence or other documents relating to negotiations, plans or deliberations about the agreement prior to the execution of the agreement; (2) reports, correspondence, documents, or other matters from, about, or to all entities other than the Applicant and two Joint Petitioners; (3) any questioning of the witnesses or presentation of documents not related to the action taken, specifically excluding questions or documents about the intent of the parties or individuals; and (4) questioning of witnesses or production of documents relating to disclosure or non-disclosure of records as that issue is clearly out of the purview of this body. (Memorandum of Law, p. 6)

Pursuant to Tenn. Code Ann. § 4-5-313, the Authority may exclude irrelevant and immaterial evidence. Tenn. Code Ann. § 4-5-313 provides:

In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be

admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records, and shall exclude evidence which in its judgment is irrelevant, immaterial or unduly repetitious.

The Tennessee Rules of Evidence apply to contested cases before the Authority. Although attorneys often use the terms material and relevant interchangeably, they are two distinct legal concepts. In order for evidence to be relevant, the evidence must satisfy two criteria. First, the evidence must have the “tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” *See* Tenn. R. Evid. 401. Second, the fact sought to be proven must be material. A material fact “is of consequence to the determination of the action.” *Id.* According to the Black’s Law Dictionary (Third Edition), “Evidence offered in a cause or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.” The term “immaterially” is used where evidence is relevant to a proposition of fact, but that proposition itself is not relevant under the substantive law.

The following comments from Federal Rule 401 are instructive in considering the issue of relevancy.

RULE 401. ADVISORY COMMENTS

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience of science, applied logically to the situation at hand. James, *Relevancy, Probability and the Law*, 29 Calif. L. Rev. 689, 696, n. 15 (1941), in *Selected Writings on Evidence and Trial* 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a “tendency to make the existence” of fact to be proved “more probable or less probable.”

.....

The rule uses the phrase “fact that is of consequence to the determination of the action” to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word “material.” Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm’n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a “material” fact. (Fed. R. Evid. 401)

In the first two Pre-Hearing-Conferences, the parties developed a list of issues that they believed would go to the heart of this matter. Five issues were agreed upon. The parties were in disagreement as to specific language to be used in two other issues. As a result of that disagreement, the Pre-Hearing Officer divided those two issues into four issues. The first Pre-Hearing Officer Report containing those nine issues was approved by the Authority without objection from the parties.

As expressed by the Pre-Hearing Officer at the April 5, 2000 Pre-Hearing Conference, there are three major areas of documentation and testimony in controversy to which the Applicant and Joint Petitioners have objected in this case: (1) documentation that predates the operating agreement in this matter, (2) documentation indicating that construction efforts may have been undertaken prior to the application to the Authority and the execution of the operating agreement, and (3) documentation indicating that MLG&W employees may have shared their employment with Memphis Networkx as well as indicating the possibility that the name of Memphis Light Gas & Water has been or will be used by Memphis Networkx as a marketing tool.

In reviewing the nine issues and the motions in limine filed by the Applicant and Joint-Petitioners as to the three specific areas of documentation mentioned above, the Pre-Hearing Officer has determined that each of those three areas pertains to at least one of the nine issues.

In support of the Motion in Limine, the Applicant and Joint Petitioners put forth the following argument as to documentation or testimony that preceded the execution of the operating agreement.

Under Tennessee law, the introduction by a party to the agreement of evidence of any prior or contemporaneous negotiations or discussion for the purpose of altering, contradicting, or varying the terms of a clear and unambiguous written agreement is prohibited. While the rule itself applies to parties to an agreement, the same evidentiary principle should be applied to this proceeding and these intervenors. Under Tennessee law, when parties have entered into an agreement which includes that such is the complete agreement between the parties, evidence is not admissible to vary the terms of such a contract. *Newark Insurance Company v. Seyfert*, 392 S.W.2d 336 (Tenn. Ct. App. 1964), *cert. denied* March 4, 1965 (“It is well-settled law that when parties have made a contract and have expressed it in a [clear and unambiguous] writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parole or otherwise, of antecedent understandings, etc., will not be admitted for the purpose of varying or contracting the writing”). (Memorandum of Law, p. 7)

The legal authority relied upon by the Applicant and Joint Petitioners addresses contractual disputes arising between the parties to the contract or in one instance, the *Newark* case, a dispute between a third-party beneficiary and an insurance company as to the interpretation of an insurance policy. While the Applicant and Joint Petitioners have accurately stated the rule of law in their memorandum, the Pre-Hearing Officer finds that rule of law is not applicable to the circumstances in this case, where the Intervenor, who are not parties to the operating agreement, seek to present testimony and documentation that may demonstrate that the actual conduct of the contracting parties was not consistent with the operating agreement.

The parties have argued consistently throughout the course of this matter that cross-subsidization is a major issue in this case. The documentation in question reflects conduct on the part of MLGW and A&L before and after the execution of the operating agreement. Such documentation may assist the Authority in determining the nature of events that took place

prior to the existence of the operating agreement. The same holds true for the documentation evidencing the possible construction of facilities or the possible joint use of MLGW personnel and name recognition. Several disputes between the parties center around whether facilities were constructed prior to the operating agreement and whether certain salaries or expenses of MLGW which were devoted to the startup of Memphis Networkx have been properly allocated. While it is true that the operating agreement reflects the understanding of the parties to that agreement, the documentation in question relates to whether those parties or other entities acted before or after the operating agreement in a manner inconsistent with the terms of the operating agreement. Admission of such evidence for consideration by the Authority does not contradict the rule of law relied upon by the Applicant and Joint Petitioners.

For the foregoing reasons the Pre-Hearing Officer finds that testimony and documentation relating to the three areas are both material and relevant to the issues in this matter.¹

Motion in Limine of the Applicant and Joint Petitioners

After reviewing the Motion in Limine filed by the Applicant and Joint Petitioners on April 3, 2000 and considering argument of the parties at the Pre-hearing Conference held on April 5, 2000, and examining the record in this matter, the Pre-Hearing Officer makes the following findings and rulings as to the Motion in Limine:²

¹ Certain documentation may be relevant to the use of various forms of impeachment available to litigants. These forms of impeachment include: 1) previous inconsistent statements; 2) bias; 3) attack upon character of a witness; 4) defect of capacity and 5) contradiction. See MCCORMICK ON EVIDENCE §§ 33, 41 & 47. The fifth form of impeachment includes proof by extrinsic evidence "that material facts are otherwise than as testified to by the witness under attack." *Id.* at § 33.

² The Pre-Hearing Officer announced these rulings to the parties, by way of a telephone conference call on April 27, 2000 in depositions set in this matter. The rulings are in the record of pre-deposition matters addressed by the parties and the Pre-Hearing Officer on April 27, 2000.

As to paragraph 1, the Pre-Hearing Officer finds the documentation relevant and material to this matter and therefore denies the motion in limine.

As to paragraph 2, the Pre-Hearing Officer finds the request too broad and therefore denies the motion in limine.

As to paragraph 3, the Pre-Hearing Officer finds the documentation relevant and material to this matter and therefore denies the motion in limine.

As to paragraph 4, the Pre-Hearing Officer finds the request too broad and therefore denies the motion in limine.

As to paragraph 5, the Pre-Hearing Officer finds the documentation relevant and material to this matter and therefore denies the motion in limine.

As to paragraph 6, the Pre-Hearing Officer finds the request too broad and therefore denies the motion in limine.

As to paragraph 7, the Pre-Hearing Officer finds the request has been rendered moot.

As to paragraph 8, the Pre-Hearing Officer finds the documentation relevant and material to this matter and therefore denies the motion in limine.

Time Warner's Motion in Limine

Time Warner Telecom and Time Warner Communications filed a Motion in Limine "as to any evidence relating to the proposed AOL/Time Warner merger, cross-subsidization of products or services by any Time Warner affiliated" Time Warner asserts that this type of evidence is irrelevant to the issues in this proceeding.

The Pre-Hearing Officer finds that the Applicant and Joint Petitioners have not submitted any evidence that demonstrate that evidence of this type would be material and relevant to the issues under consideration in this matter. For this reason **the Pre-Hearing Officer grants Time Warner's Motion in Limine.**

Objections of Applicants and Joint Petitioners to Barta Exhibits

On April 3, 2000, the Applicant and Joint Petitioners filed objections to the pre-filed testimony and exhibits of TCTA witness William J. Barta. With the exception of Mr. Barta's curriculum vitae, the Applicants and Joint Petitioners object to each and every exhibit accompanying Mr. Barta's testimony. Specifying each exhibit, the Applicant and Joint Petitioners raised their objections as follows:

Exhibit (WJB-2)

Area of Regulatory Concern: Use of MLGW's Existing Infrastructure

As to Exhibit WJB-2, the Applicant and Joint Petitioners objects to the following documents as being irrelevant to the issues in this proceeding:

- (1) April 22, 1999 Draft of Memorandum of Understanding (MOU).
- (2) September 29, 1999 Memo from Michael Kissell to Wade Stinson
- (3) November 25, 1999 Interdepartmental Communication from Mike Kissell
- (4) **A&L Networks LLC December 1, 1998 Response to MLGW Request for Proposal for Strategic Telecommunications Partnership**
- (5) MFS Network Technologies Response to MLGW Request for Proposal for Telecommunications Strategic Partner
- (6) BellSouth Business Systems Response to MLGW Request for Proposal for Telecommunications Strategic Partner

The Applicant and Joint Petitioners object to the following documents in Exhibit WJB-2 as being irrelevant to the issue of the use of MLGW's existing infrastructure:

- (7) March 24, 1999 Memo from Erik Wetmore to MLGW Corp.
- (8) March 2, 1999 Letter from Joel D. Halvorson of Arthur D. Little to Wade Stinson and Alex Lowe
- (9) January 6, 1999 Proposal of A&L Networks LLC, Arthur D. Little, Inc., and Nortel Networks to MLGW for Strategic Telecommunications Partnership

Exhibit (WJB-3)

Area of Regulatory Concern: Unrestricted Access to MLGW Personnel and Customer Information

As to Exhibit WJB-3, the Applicant and Joint Petitioners object to the following documents as being irrelevant to the issues of access to MLGW personnel or customer information in this proceeding:

- (1) A&L Networks LLC December 1, 1998 Response to MLGW Request for Proposal for Strategic Telecommunications Partnership
- (3) January 6, 1999 Proposal of A&L Networks LLC, Arthur D. Little, Inc., and Nortel Networks to MLGW for Strategic Telecommunications Partnership

The Applicant and Joint Petitioners object to the following documents in Exhibit WJB-3 as being irrelevant to the issue of time spent by MLGW's employees on the telecom joint venture:

- (2) March 2, 1999 Letter from Joel Halvorson of Arthur D. Little to Wade Stinson and Alex Lowe
- (4) March 10, 1999 Memo from Joel Halvorson to Wade Stinson
- (5) April 8, 1999 Memo from Joel Halvorson to Wade Stinson

Exhibit (WJB-4)

Area of Regulatory Concern: Exploiting MLGW Name Recognition

As to Exhibit WJB-4, the Applicant and Joint Petitioners object to the following documents as being irrelevant to the issues in this proceeding:

- (1) April 9, 1999 Letter from Alex Lowe to W.L. Thompson
- (4) November 25, 1999 Interdepartmental Communication from Mike Kissell

The Applicant and Joint Petitioners objected to the following documents in Exhibit WJB-4 as having no probative value.

- (2) A&L Networks LLC December 1, 1998 Response to MLGW Request for Proposal for Strategic Telecommunications Partnership

- (3) January 6, 1999 Proposal of A&L Networks LLC, Arthur D. Little, Inc., and Nortel Networks to MLGW for Strategic Telecommunications Partnership

Exhibit (WJB-5)

Area of Regulatory Concern: Deployment of Facilities and Entering into Contracts Prior to Receiving Regulatory Approval

As to Exhibit WJB-5, the Applicant and Joint Petitioners object to the following documents as being irrelevant to the issues in this proceeding:

- (1) June 1, 1999 Letter from Alex Lowe to Wade Stinson and Larry Thompson
- (2) April 1, 1999 Letter from Alex Lowe to J.B. Hollingsworth, General Manager, BellSouth Telecommunications, Inc.
- (3) May 24, 1999 Meeting Notes
- (4) September 29, 1999 Memo from Michael Kissell to Wade Stinson
- (5) October 1999 Agreement between MLGW and A&L Networks-Tennessee, LLC to establish a joint venture to provide Telecom Services

Exhibit (WJB-6)

E-Mail Message From Allan Long To Michael Kissell, Wade Stinson of 9/15/1999 at 10:45 a.m. Re: Fiber in Power Space

The Applicant and Joint Petitioners object to Exhibit WJB-6 as being irrelevant to the issues in this proceeding.

Pre-Hearing Officer's Rulings on Objections

On the basis of the previous ruling as to relevancy and materiality, the Pre-Hearing Officer makes the following rulings regarding the Objections filed by the Applicant and Joint Petitioners.

As to **Exhibit WJB-2**, the Pre-Hearing Officer finds that each document excerpted in that Exhibit is relevant and material to the issues in this proceeding. Michael Kissell has been identified in Wade Stinson's pre-filed testimony as the Supervisor of Telecom Engineering for MLG&W. (Pre-filed Rebuttal Testimony of Wade Stinson, p. 3). Eric Wetmore and Joel

D. Halvorson have been identified as consultants in the employment of Arthur D. Little, Inc. (See Pre-filed Rebuttal Testimony of Wade Stinson, p. 4 and Pre-filed testimony of Ward Huddleston, p. 4). Mr. Huddleston has testified that Memphis Networx will utilize Arthur D. Little, Inc. to promote managerial expertise. (See Pre-filed Testimony, pp. 3-4). Each document was generated by a MLG&W employee or by a third party and sent to a MLG&W employee. The documents refer to the development of a telecommunications system on the part of MLG&W. **For these reasons, the Pre-Hearing Officer denies the objections of the Applicant and Joint Petitioners to Exhibit WJB-2.**

As to **Exhibit WJB-3**, the Pre-Hearing Officer finds that each document excerpted in that Exhibit is relevant and material to the issues in this proceeding. Each document was directed to MLG&W or an employee thereof and involved the subject of the telecommunications venture. **For these reasons, the Pre-Hearing Officer denies the objections of the Applicant and Joint Petitioners to Exhibit WJB-3.**

As to **Exhibit WJB-4**, the Pre-Hearing Officer finds that each document excerpted in that Exhibit is relevant and material to the issues in this proceeding. The parties named as being the author or recipient of the documents have been identified as parties or employees of parties in this action. Each document relates to telecommunications activity on the part of one or more parties to this action. **For these reasons, the Pre-Hearing Officer denies the objections of the Applicant and Joint Petitioners to Exhibit WJB-4.**

As to **Exhibit WJB-5**, the Pre-Hearing Officer finds that each document excerpted in that Exhibit is relevant and material to the issues in this proceeding. With the exception of document number 3 (May 24, 1999 Meeting Notes), each document on its face reveals that it was authored by a party in this action. Document 3 makes reference to construction efforts by A&L Networks and MLG&W. Wade Stinson has admitted that he authored these notes.

(Pre-filed Rebuttal Testimony of Wade Stinson, p. 8). **For these reasons, the Pre-Hearing Officer denies the objections of the Applicant and Joint Petitioners to Exhibit WJB-5.**

The Pre-Hearing Officer finds that **Exhibit WJB-6** is relevant and material to the issues in this proceeding. Wade Stinson has testified that the author of this memorandum, Allan Long, is the Supervisor of Distribution Engineering for MLG&W. (Pre-filed Rebuttal Testimony of Wade Stinson, p. 9). The memorandum sets forth discussions between employees of MLG&W during the planning stages of the telecommunications venture. The fact that the document may pre-date the execution of the Operating Agreement does not render it irrelevant or immaterial. **For these reasons, the Pre-Hearing Officer denies the objections of the Applicant and Joint Petitioners to Exhibit WJB-6.**

Objections of Applicant and Joint Petitioners to Barta Testimony

The Applicant and Joint Petitioners have also objected to the following selected portions of William J. Barta's pre-filed testimony.

OBJECTION 1

Q. WHAT IS THE BASIS FOR YOUR CONCLUSION? (p. 11, lines 24-27)

A. . . . The companies' strategy to intertwine the existing utility operations with those of the nonregulated telecommunications venture is apparent based upon a review of internal correspondence as well as information exchanged with external parties.

Q. YOU HAVE INDICATED THAT THE TRA SHOULD CONSIDER DENYING THIS APPLICATION. WHAT IS THE BASIS FOR THE RECOMMENDATION? (p. 12, lines 15-17)

A. . . . First, the companies' insistence that only minimal affiliate transaction activity has occurred or will occur between Memphis Networkx and the regulated, utility divisions of MLGW is at odds with its actual behavior and intent.

The Applicant and Joint Petitioners object to this testimony as containing an erroneous assumption and/or a mistake in law.

OBJECTION 2

Q. PLEASE PROVIDE SPECIFIC EXAMPLES WHERE INDIVIDUALS ASSOCIATED WITH MLGW OR MEMPHIS NETWORKX HAVE INDICATED AN INTENT TO RESTRICT ACCESS TO INFORMATION? (p. 13, lines 9-15)

A. In a July 22, 1999 memo from Erik Wetmore to a MLGW distribution list, “in-kind contributions” were discussed:

“In-kind contribution: Herman was curious why A&L was granted \$1.2 million for its in-kind contribution and MLGW \$0.0. I mentioned that this was in part due to public disclosure reasons, but Herman will talk to Wade and Mike to get their thoughts and recommendations.”

The Applicant and Joint Petitioners object to this excerpt and the testimony that the information involves preliminary discussions and irrelevant to the issues before the Authority in this proceeding.

OBJECTION 3

The Applicant and Joint Petitioners object to the excerpt from an E-mail dated August 23, 1999 between Wade Stinson and Alex Lowe referenced on **page 13 and 14** of Mr. Barta’s testimony on the grounds the information is irrelevant to issues in this proceeding.

OBJECTION 4

The Applicant and Joint Petitioners object to the references to meeting notes on **page 14, lines 10-18** of Mr. Barta’s testimony on the grounds they are irrelevant do not constitute official business records of MLG&W and have no legal effect.

The Pre-Hearing Officer denies Objections 2, 3 and 4 upon the finding that the documents in question are relevant to the proceeding.

Other Objections

The Applicant and Joint Petitioners object to the document production request dated March 31, 2000 directed to deponent, Larry Thompson for the production of records at his deposition on April 6, 2000. **The Pre-Hearing Officer finds this objection moot.**

The Applicant and Joint Petitioners also objected to the documents on the list filed by Time Warner on March 31, 2000 which set forth the exhibits to be used in connection with William Barta's testimony at the Hearing. Applicant and Joint Petitioners object to the introduction of these documents on the grounds that no reason has been given for the introduction of such documents. Applicant and Joint Petitioners renew their objections to the proposed exhibits which constitute documents from which excerpts were taken in Mr. Barta's testimony. **The Pre-Hearing Officer has found the exhibits relevant to this proceeding and denies the Objection of the Applicant and Joint Petitioners.**

Time Warner's Objections to Pre-filed Rebuttal Testimony

On April 3, 2000, Time Warner filed objections to specific pre-filed testimony from John McCullough, Wade Stinson, Maxwell Williams and Ward Huddleston. The ruling of the Pre-Hearing Officer as to each objection follows the objection by Time Warner and the response of the Applicant and Joint Petitioners.

TESTIMONY OF JOHN McCULLOUGH

OBJECTION 1

- Q. WOULD THERE BE AN INCENTIVE FOR TIME WARNER TO SUBSIDIZE ITS COMPETITIVE TELCOM SERVICES COMPANY WITH ASSETS FROM ITS REGULATED MONOPOLY CABLE TELEVISION OPERATIONS? (p. 4)**
- A. Yes. Mr. Barta's statements regarding incentives to subsidize would apply to Time Warner in that the Time Warner entities, I believe, are ultimately owned by the same parent and cross subsidy of the telecom operation by cable assets**

would enable Time Warner to shift cost to the monopoly service and away from the competitive service.

Time Warner objects to the question as irrelevant and as being based upon speculation and conjecture. Further, Time Warner asserts that there was no foundation establishing that Mr. McCullough had personal knowledge or experience regarding the matter on which he gave his opinion.

The Applicant and Joint Petitioners assert that Mr. McCullough's testimony is relevant to the issues in this docket and also assert that cross-subsidization issues under Tenn. Code Ann. § 65-5-208 apply to competitive local exchange carriers equally and as such the Authority should consider this issue with respect to Time Warner.

The Pre-Hearing Officer finds that the Applicant and Joint Petitioners have provided no foundation for Mr. McCullough's response. Further, the Applicant and Joint Petitioners have not demonstrated that the information provided in the response is material to any issue in this case. **The Pre-Hearing Officer grants Time Warner's objection and strikes the question and answer.**

OBJECTION 2

Q. HAS THE TRA ADOPTED ANY RULES, REGULATIONS OR POLICIES THAT WOULD PREVENT TIME WARNER FROM SUBSIZING ITS TELECOM OPERATIONS WITH ITS MONOPOLY CABLE OPERATIONS? (p. 4)

A. Not to my knowledge.

Time Warner objects to the question on the grounds that the question was not relevant to the issues in this docket.

The Applicant and Joint Petitioners assert that Mr. McCullough's testimony is relevant to the issues in this docket and also assert that cross-subsidization issues under Tenn. Code

Ann. § 65-5-208 apply to competitive local exchange carriers equally and as such the Authority should consider this issue with respect to Time Warner.

The Pre-Hearing Officer finds that the Applicant and Joint Petitioners have provided no foundation for Mr. McCullough's response. Further, the Applicant and Joint Petitioners have not demonstrated that the information provided is material to any issue in this case. **The Pre-Hearing Officer grants Time Warner's objection and strikes the question and answer.**

OBJECTION 3

Q. PLEASE COMMENT ON MR. BARTA'S TESTIMONY REGARDING THE NEED FOR A FORMAL SET OF TERMS AND CONDITIONS GOVERNING AFFILIATE TRANSACTIONS BETWEEN MEMPHIS NETWORKX AND MLGW. (p. 4 & 5)

A.Mr. Barta appears to be saying that if we do what we say we are going to do in our testimony and responses to the data requests, then no formal set of terms and conditions governing affiliate transactions need be adopted by the Authority. However, Mr. Barta states that he does not believe that MLGW plans to implement these procedures, based upon the review of numerous documents. The documents that he cites involve various preliminary discussions regarding the telecommunications project, which do not represent MLGW's ultimate decision regarding the form of the telecommunication venture. Mr. Barta has reviewed these documents out of context and has made unreasonable conclusions regarding them.

On November 8, 1999 MLGW and A&L Networks-Tennessee, LLC entered into the umbrella agreement and Operating Agreement which were attached as Exhibit M to the supplemental filing on January 11, 2000, and Exhibit E to the application in this docket, respectively. These are the documents that govern the relationship between MLGW and A&L and described the joint venture. Many things were discussed prior to entering into the operating agreement and the umbrella agreement however, these agreements and the testimony in this docket set forth the current plan and concept for the venture.

Time Warner objects to the question because of its improper form and because Mr. McCullough failed to provide factual support for his opinion.

The Applicant and Joint Petitioners assert that Mr. McCullough's testimony is relevant to the issues in this docket.

While the question to Mr. McCullough may be inartful in form, as pre-filed testimony the question appears designed to elicit Mr. McCullough's thoughts regarding Mr. Barta's testimony. Mr. McCullough is subject to cross-examination as to his competency to answer the question. **Time Warner's objection is denied.**

OBJECTION 4

Q. WILL MEMPHIS NETWORKX HAVE UNRESTRICTED ACCESS TO MLGW PERSONNEL? (p. 6 & 7)

A. Absolutely not. Memphis Networkx has its own employees. None of them are common employees with MLGW. MLGW has used its own resources to determine whether it wanted to become involved in a telecommunication venture, what form that would take and to take steps to protect its investment in the proposed venture. These are proper expenses of MLGW which have been allocated to the electric division and will be transferred to the telecommunication division upon TRA approval.

Time Warner objects that Mr. McCullough's answer to MLG&W's question is unresponsive and, that even if responsive, Mr. McCullough is not qualified to answer the question.

The Applicant and Joint Petitioners assert that Mr. McCullough is qualified to respond to the question as asked based on his work on the telecommunications project with MLG&W and his involvement in negotiating the Operating Agreement between the parties.

The Pre-Hearing Officer finds that beyond, "Absolutely not," Mr. McCullough's answer is not responsive to the question. The question focuses on "access" not the actual employment status of Memphis Networkx or MLG&W. **The Pre-Hearing Officer grants Time Warner's objection in part and strikes the response following "Absolutely not."**

OBJECTION 5

Q. HAS MLGW DEPLOYED FACILITIES ON BEHALF OF MEMPHIS NETWORKX WITHOUT RECEIVING PROPER APPROVAL FROM THE TRA? (p. 7)

A. No.

Time Warner objects that Mr. McCullough's answer to MLG&W's question is unresponsive and, that even if responsive, Mr. McCullough is not qualified to answer the question.

The Applicant and Joint Petitioners assert that Mr. McCullough is qualified to respond to the questions asked based on his work on the telecommunications project with MLG&W and his involvement in negotiating the Operating Agreement between the parties.

The Pre-Hearing Officer finds Mr. McCullough's answer responsive to the question. Further, Mr. McCullough's earlier testimony concerning his position with MLG&W and his role in the telecommunications venture would indicate he is qualified to answer the question.

Time Warner's objection is denied.

OBJECTION 6

Q. MR. BARTA STATES THAT HE IS DISTURBED BY "THE COMPANIES' EFFORTS TO RESTRICT DISCLOSURE OF INFORMATION AND MATERIAL THAT WOULD PERMIT AN OBJECTIVE REVIEW OF ITS OPERATIONS AND AFFILIATE TRANSACTIONS." PLEASE RESPOND TO THIS. (p. 8 & 9)

A. MLGW has not sought to restrict such disclosure. The memos that Mr. Barta cites in his exhibits are excerpts from approximately 5,000 pages of documents that MLGW produced pursuant to a public records request from John Farris, counsel for TCTA and Time Warner and from responses to discovery requests in this proceeding. Certainly, any private company such as Memphis Network, A&L, Time Warner or Nextlink is concerned about their proprietary and competitively sensitive documents being disclosed to the public. This is evidenced by the fact the counsel for Time Warner and Nextlink proposed additional language for the protective agreement filed in this docket to ensure any proprietary responses to our data requests were kept out of the offices of MLGW and the public files.

Mr. Barta's statements appear to be intended to raise unfounded and negative innuendoes toward the applicant and joint petitioners.

Time Warner objects to the question because of its improper form and because Mr. McCullough failed to provide factual support for his opinion. Time Warner also asserts that the response is irrelevant and speculative and that Mr. McCullough has no personal knowledge to answer the question.

The Applicant and Joint Petitioners assert that to the extent that Mr. McCullough's response is irrelevant, as the Intervenor alleged, the direct testimony of Mr. William Barta to which Mr. McCullough responded, is also irrelevant. If Mr. Barta's testimony is determined to be irrelevant and is stricken, then the Applicant and Joint Petitioners would withdraw this portion of Mr. McCullough's testimony.

The Pre-Hearing Officer finds that a portion of Mr. McCullough's answer is unresponsive and therefore grants Time Warner's objection in part and strikes the following sections of the answer:

"Certainly, any private company such as Memphis Network, A&L, Time Warner or Nextlink is concerned about their proprietary and competitively sensitive documents being disclosed to the public. This is evidenced by the fact the counsel for Time Warner and Nextlink proposed additional language for the protective agreement filed in this docket to ensure any proprietary responses to our data requests were kept out of the offices of MLGW and the public files."

"Mr. Barta's statements appear to be intended to raise unfounded and negative innuendoes toward the applicant and joint petitioners."

OBJECTION 7

Q. PLEASE RESPOND TO THE STATEMENT REGARDING THE MEETING NOTES ON PAGE 14, LINES 10-18 OF MR. BARTA'S TESTIMONY. (p. 9)

A. It is my understanding that the notes referenced on page 14 of Mr. Barta's testimony were prepared by an intern from ADL during a brainstorming meeting set up by ADL, at which I was present, which occurred in July, 1999. I believe the notes represent the random thoughts that occurred at this meeting. There was never any discussion as to "slipping" the budget through the Board. The December date appears to reference the date the city council passed the

budget. Our expenditures, like all capital expenditures, were included as line items in the approved budget. Obviously, the author of the notes did not know the parties given the misspelling of their names, and did not fully understand some of the issues being discussed.

Time Warner objects to Mr. McCullough's answer based upon lack of foundation and personal knowledge about the subject matter.

The Applicant and Joint Petitioners state that Mr. McCullough explained that the documents upon which his rebuttal testimony based are referenced in Mr. Barta's testimony and are not official MLG&W documents. Therefore, these documents should not be included in the evidentiary record.

The Pre-Hearing Officer finds that there is a lack of foundation and personal knowledge of the subject matter on the part of Mr. McCullough as to portions of his response. **The Pre-Hearing Officer grants Time Warner's objection in part and strikes the following portions of the answer:**

"I believe the notes represent the random thoughts that occurred at this meeting."

"Obviously, the author of the notes did not know the parties given the misspelling of their names, and did not fully understand some of the issues being discussed."

OBJECTION 8

Q. HAS MLGW COMPLIED WITH THE PROVISIONS OF T.C.A. § 7-52-402-405? (p. 10 & 11)

A. With respect to T.C.A. § 7-52-402, MLGW is not providing the services directly. MLGW has formed a Telecommunications Division within the Electric Division in order to separate and allocate cost attributable to its investment in Memphis Networkx, telecommunications joint venture. As stated earlier, we have obtained approval from the comptroller from an interdivisional loan, however no funds have been advanced under the loan as we are awaiting TRA approval.

With respect to T.C.A. § 7-52-403(b), as indicated above, MLGW is not providing the service directly. However, it is my understanding that Memphis Networkx does not plan to provide communications services in the territories of

incumbent local exchange carriers with less than 1000,000 access lines, except as may be allowed by state or federal law. With respect to T.C.A. § 7-52-404 — tax equivalent payments, payments will be based upon revenues that we receive from our ownership interest in Memphis Networkx. Again, MLGW is not providing the services directly. MLGW will continue to comply with Tennessee statutes that proscribe transfers from municipal utilities to the city for in-lieu-of-tax payments. Memphis Networkx will pay all applicable franchise fees.

With respect to T.C.A. § 7-52-405, MLGW will charge Memphis Networkx the highest rate it charges to any person or entity for a comparable pole attachment. MLGW will also charge Memphis Networkx any applicable rights-of-ways fees, charges or payments required by state or local law that it would charge to any other company. Consequently, MLGW has complied with and/or will comply with T.C.A. § 7-52-402-405 as situations arise that require compliance.

Time Warner objects to Mr. McCullough's question and testimony in response on the grounds that it requires a legal conclusion.

The Applicant and Joint Petitioners assert that Mr. McCullough is qualified, based on his position as Vice President of MLG&W, to answer questions with respect to his understanding of MLG&W's compliance with statutory procedures. Further Mr. McCullough is not making legal conclusions, but providing factual information.

It is for a Court to reach the legal conclusions in a case. An expert can testify as to ultimate facts, but it is for the decision-maker to reach the legal conclusions. The Tennessee Supreme Court has spoken on this issue in its decision in *Coffey v. City of Knoxville*, 866 S.W. 2d 516 (Tenn. 1993):

Tenn. R. Evid. 704, as we understand it, allows the opinion of an expert to reach an ultimate fact, if it establishes: (1) conclusions that they may be reached upon what causes a particular fact to exist, or (2) the existence of a fact, which may be the ultimate fact sought to be proven. However, this does not permit the expert witness to express an opinion as to the applicable legal conclusion to be drawn from the ultimate fact proven. The legal conclusions to be drawn from facts is a judicial function and only the court may reach legal conclusions. At p. 518.

Question to expert or lay witnesses which seek a legal conclusion are improper. The Pre-Hearing Officer finds that the question does not necessarily call for a legal conclusion and Mr. McCullough does not provide a legal conclusion until the final sentence of his answer. The other portion of his testimony provide factual information concerning possible compliance.

The Pre-Hearing Officer allows the question and response to stand but strikes the final sentence of McCullough's answer: "Consequently, MLGW has complied with and/or will comply with T.C.A. § 7-52-402-405 as situations arise that require compliance."

OBJECTION 9

Q. WHAT CONDITIONS, RULES AND/OR REPORTING REQUIREMENTS, IF ANY, ARE NECESSARY TO INSURE COMPLIANCE BY MLGW AND MEMPHIS NETWORKX WITH THE PROVISIONS OF T.C.A. § 7-52-402-405? (p. 11)

A. I do not believe that any condition rules or reporting requirements are necessary to insure compliance by MLGW and Memphis Networkx with the provisions of T.C.A. § 7-52-402-405. I am not a lawyer, however, it is my understanding that some of these provisions are not within the TRA's jurisdiction to enforce. For example, the comptroller must approve our interdivisional loan and we have to make tax equivalent payments to the City of Memphis. In any event, regardless of the enforcing entity, these requirements are in Tennessee statutes and MLGW intends to comply with the law. If we do not comply with provisions that the TRA has jurisdiction to enforce, this agency has the power to investigate, ask for voluntary compliance and/or issue a show-cause order. We think that this is sufficient to insure compliance.

Time Warner objects to the question and Mr. McCullough's testimony in response on the grounds that it requires a legal conclusion.

The Applicant and Joint Petitioners assert that Mr. McCullough is qualified, based on his position as Vice President of MLG&W, to answer questions with respect to his

understanding of MLG&W's compliance with statutory procedures. Further Mr. McCullough is not making legal conclusions, but providing factual information.

The Pre-Hearing Officer finds that Mr. McCullough is not expressing a legal conclusion in his answer. This can be clarified on cross-examination. **Time Warner's objection is denied.**

OBJECTION 10

Q. WHAT CONDITIONS, RULES, OR REPORTING REQUIREMENTS, IF ANY, ARE NECESSARY TO ENSURE APPLICANT'S AND PETITIONERS COMPLIANCE WITH THE PROHIBITION AGAINST ANTI-COMPETITIVE PRACTICE PROVISION OF T.C.A. § 7-52-103(d)? (p. 11 & 12)

A. As stated above, T.C.A. § 7-52-103(d) is the law. MLGW intends to comply with the law. To the extent that the TRA has regulatory authority over our compliance with the law, the TRA has the authority to do investigations and issue show-cause order, etc., if they believe we are violating the law and order use to comply with it. We believe that is sufficient.

Time Warner objects to Mr. McCullough's question and testimony in response on the grounds that it requires a legal conclusion.

The Applicant asserted that Mr. McCullough is qualified, based on his position as Vice President of MLG&W, to answer questions with respect to his understanding of MLG&W's compliance with statutory procedures. Further Mr. McCullough was not making legal conclusions, but providing factual information.

The Pre-Hearing Officer finds that Mr. McCullough's answer does not express a legal conclusion and therefore denies Time Warner's objections.

OBJECTION 12³

Q. WHAT CONDITIONS, RULES OR REPORTING REQUIREMENTS, IF ANY, ARE NECESSARY TO INSURE APPLICANT'S AND PETITIONERS' COMPLY, TO THE EXTENT APPLICABLE, WITH T.C.A. § 65-5-208(c)? (p. 12)

A. I am no lawyer, but I understand there is some question about whether this provision is applicable to MLGW and Memphis Networkx. If it is applicable to us, MLGW is already putting into place structure and practices that will safeguard against anti-competitive practices pursuant to T.C.A. § 7-52-103(d) which should also satisfy T.C.A. § 65-5-208(c). If more is required of us than that, and the TRA tells us what it is, then we will comply with it. Again, no condition, rules or reporting requirements are necessary because we intend to comply with the law and the TRA has the ability to investigate and order enforcement of the law.

Time Warner objects to the question and Mr. McCullough's testimony in response on the grounds that it requires a legal conclusion.

The Applicant and Joint Petitioners asserted that Mr. McCullough is qualified, based on his position as Vice President of MLG&W, to answer questions with respect to his understanding of MLG&W's compliance with statutory procedures. Further Mr. McCullough was not making legal conclusions, but providing factual information.

The Pre-Hearing Officer finds that Mr. McCullough's answer does not express a legal conclusion and therefore denies Time Warner's objections.

OBJECTION 13

Q. WHAT MEASURES HAS MLGW TAKEN TO PREVENT CROSS-SUBSIDIZATION OF MEMPHIS NETWORKX? (p. 2)

A.We believe these safeguards are consistent with the safeguards approved by the TRA in The Chattanooga Electric Power Board Case (Docket No. 97-007488). Although I am not a lawyer, I understand that the FCC's Affiliate Transaction Rules (47 CFR § 32.27) and the structural separation provisions of 47 USC 272(d) are not applicable to MLGW and Memphis

³ Time Warner acknowledged during the Pre-Hearing Conference that the objections were not numbered correctly, inadvertently omitting a number 11.

Networx, I have been advised that Exhibit A is consistent with the spirit of those provisions.

Time Warner objects to Mr. McCullough's question and excerpted testimony in response on the grounds that it requires a legal conclusion.

The Applicant and Joint Petitioners assert that Mr. McCullough is qualified, based on his position as Vice President of MLG&W, to answer questions with respect to his understanding of MLG&W's compliance with statutory procedures. Further Mr. McCullough is not making legal conclusions, but providing factual information.

The Pre-Hearing Officer finds that Mr. McCullough is not expressing a legal opinion and for this reason, Time Warner's objection is denied.

TESTIMONY OF WADE STINSON

OBJECTION 1

Q. PLEASE SUMMARIZE YOUR TESTIMONY. (p. 2)

A.MLGW's existing infrastructure will be made available to Memphis Networx through arms-length negotiations.....These expenses will be allocated to the Telecommunications Division as appropriate, upon approval of this application and Joint Petition by the TRA.....

Time Warner objects to the excerpted portion of Mr. Stinson's testimony because it provides an opinion without any foundation and requires a legal conclusion.

The Applicant and Joint Petitioners assert that Mr. Stinson's response constitutes a proper summary of his testimony and of the testimony of Mr. McCullough and Mr. Barta. Further, the summary of that testimony provides the foundation for Mr. Stinson's response.

The Pre-Hearing Officer finds that the question and Mr. Stinson's answer are proper and therefore denies Time Warner's objection. The concerns raised by Time Warner can be addressed through cross-examination.

OBJECTION 2

Q. MR. McCULLOUGH RESPONDED TO SOME OF THE CORRESPONDENCE IN MR. BARTA'S EXHIBITS, HOWEVER, HE DEFERRED TO YOU ON OTHERS. LET'S START WITH EXHIBIT WJB-2 WHICH SETS FORTH MR. BARTA'S CONCERNS REGARDING MEMPHIS NETWORK'S USE OF MLGW'S EXISTING INFRASTRUCTURE. (p. 3)

A.Although the September 29, 1999 memo says that the Entergy project has reached "crunch time", the crunch was obviously Entergy's perception, because none of the fiber discussed in this memo has been deployed.

Time Warner objects to the excerpted portion of Mr. Stinson's testimony as speculative because it provides no evidence that Mr. Stinson has personal knowledge of this matter.

The Applicant and Joint Petitioners assert that Mr. Stinson provided his understanding of a memorandum presented for his comments and that the memorandum is not relevant to these proceedings. Further, the Applicant and Joint Petitioners assert that Mr. Stinson had personal knowledge of the matter about which he testified.

The Pre-Hearing Officer finds that Mr. Stinson's answer reflects his perceptions of the memorandum. Mr. Stinson's competency to respond can be explored through cross-examination. **The Pre-Hearing Officer denies Time Warner's objection.**

OBJECTION 3

Q. LET'S NOW GO TO EXHIBIT WJB-3 WHERE MR. BARTA RAISES CONCERNS ABOUT ACCESS TO MLGW PERSONNEL AND CUSTOMER INFORMATION. PLEASE COMMENT ON THE EXHIBITS THAT HAVE NOT BEEN COMMENTED UPON BY OTHER WITNESSES.

4. March 10, 1999 memo from Joel Halvorson to Wade Stinson (p. 6)
.....This type of information is routinely made available to telecommunications providers interested in or involved in deploying facilities in Shelby County. However, MLGW did not get involved in market analysis

activities as indicated in the next memo listed in WJB-3, i.e., the April 8, 1999 memo from Joel Halvorson to Wade Stinson.

Time Warner asserts that Mr. Stinson is not qualified to give an opinion the subject matter of the question. Time Warner objects to the excerpted portion of Mr. Stinson's testimony.

The Applicant and Joint Petitioners assert that Mr. Stinson's is qualified to testify as to the type of information that MLG&W routinely provides to telecommunications providers.

The Pre-Hearing Officer finds that Mr. Stinson is qualified to testify regarding the subject matter and denies Time Warner's objection.

OBJECTION 4

Q. PLEASE COMMENT ON WJB EXHIBIT 6 WHICH IS A MEMO FROM ALLEN LONG TO MICHAEL KISSELL AND WADE STINSON. (p. 9)

A. Allen Long is the Supervisor of Distribution Engineering for MLGW. This memo is dated September 15, 1999, which is before the Operating Agreement was signed. We were therefore still in the planning stages for the telecom venture. Being a layman and not a lawyer, he was curious as to why the plan was leveraging the MLGW assets. Mr. Long has not been directly involved in the telecom venture and was merely expressing his opinions. MLGW construction crews have not run service drops nor done any of the other things that Mr. Long would suggest as possibility in the next to last paragraph of Exhibit WJB-6.

Time Warner objects to Mr. Stinson's testimony as speculative.

The Applicant and Joint Petitioners assert that the documents about which Mr. Stinson testified are not relevant to these proceedings and should be stricken from the evidentiary record, thereby eliminating Mr. Barta's testimony and the need for Mr. Stinson testimony.

The Pre-Hearing Officer has found that the documents referred to in Mr. Stinson's testimony are relevant and material to this matter. The Pre-Hearing Officer finds that a portion of Mr. Stinson's response is speculative and lacks competency. **Therefore, the Pre-**

Hearing Officer grants Time Warner's objection in part and strikes the following portion of the testimony:

"Being a layman and not a lawyer, he was curious as to why the plan was leveraging the MLGW assets.

The Pre-Hearing Officer also strikes a portion of a sentence "was merely expressing his opinion," thereby ending that sentence with the word "venture."

OBJECTION 5

Q. PLEASE RESPOND TO MR. BARTA'S ALLEGATION THAT THERE WAS AN ATTEMPT BY MLGW TO RESTRICT ACCESS TO INFORMATION WHICH IS SET FORTH ON PAGE 13, LINES 17-36 THROUGH PAGE 14, LINES 1-8. (p. 9)

A. First, I think it is important to note that this is an e-mail that came from my files, and the only reason that the intervenors have access to this e-mail is because MLGW gave it to them pursuant to a public records request. It is not unusual for private companies engaged in competitive activities to want to keep their competitively sensitive documents out of the hands of their competitors. Certainly, Time Warner, NextLink and BellSouth have the same concerns regarding their own records. This is evidenced by their involvement in designing a protective order that would keep their confidential documents away from the premises of MLGW. Although I may have been sympathetic to those concerns, I can honestly say that no list of sensitive information was compiled and no documents were moved from MLGW to A&L or Memphis Networkx to prevent disclosure of sensitive information. As stated in MLGW and A&L's response to the data request from TCTA, "Max" (Max Williams, General Counsel of MLGW) and MLGW's other legal counsel were not aware of this e-mail until their review of documents in responding to John Farris' December 1999 public records request. "Ricky" (Ricky Williams, Counsel for A&L) was not aware of this e-mail until the data request by TCTA was made.

Time Warner objects to Mr. Stinson's response on the grounds that it is not relevant.

The Applicant and Joint Petitioners assert that the documents upon which Mr. Stinson's testifying are not relevant to these proceedings and should be stricken from the evidentiary record, thereby eliminating Mr. Barta's testimony and the need for Mr. Stinson's testimony.

The Pre-Hearing Officer finds that a portion of Mr. Stinson's testimony is lacking foundation and is not material to the issues in this matter. **The Pre-Hearing Officer grants Time Warner's objection in part and strikes the following portion of Mr. Stinson's testimony:**

"Certainly, Time Warner, Nextlink and BellSouth have the same concerns regarding their own records. This is evidenced by their involvement in designing a protective order that would keep their confidential documents away from the premises of MLGW. Although I may have been sympathetic to those concerns,....."

TESTIMONY OF J. MAXWELL WILLIAMS

Q. DO YOU HAVE ANY GENERAL COMMENTS REGARDING MR. BARTAS' TESTIMONY? (p. 2)

A. Yes. I find it curious that the TCTA has intervened and taken such an active role in this proceeding in light of the fact that they have responded to our data requests indicating that they are not aware of any of their members who have affiliates who are competitive local exchange carriers (CLECs) or otherwise regulated by the TRA. The TRA does not regulate cable service. The only way that Memphis Networkx operations would compete with cable is if another cable carrier leased facilities from Memphis Networkx to provide cable service. TCTA appears to be trying to create the perception of interest in protecting the MLGW electric rate payers from providing subsidies to Memphis Networkx, however, in reality, their intervention is designed to impede competition. The legislature has declared that public policy and the TRA should promote competition. Therefore, the Application and Joint Petitions should be approved.

Time Warner objects to Mr. Williams' response on the grounds that the response is not relevant to any issue addressed in this docket and additionally that the response is speculative, conjective and for the purpose of argument.

As to Time Warner's objection, the Applicant and Joint Petitioners assert that Mr. Williams' response is relevant as to Time Warner's interest in preventing competition in the telecommunications industry.

The Pre-Hearing Officer finds that Mr. Williams' answer is unresponsive to the question and immaterial to the issues in this case. **The Pre-Hearing Officer grants Time Warner's objection and strikes Mr. Williams' testimony.**

TESTIMONY OF WARD HUDDLESTON, JR.

Q. DURING THE COURSE OF DISCOVERY IN THIS PROCEEDING, MEMPHIS NETWORKX CIRCULATED SOME UPDATED FINANCIAL DOCUMENTS. DO YOU WISH TO SUPPLEMENT YOU'RE APPLICATION WITH THESE DOCUMENTS? (p. 2)

A.I believe Time Warner and the Tennessee Cable Telecommunications Association are opposed to the open access strategy of Memphis Networkx, that is to provide fair and unrestricted access to any internet service provider or other content provider. This is the same concern raised in congressional hearings regarding the AOL/Time Warner merger, since Time Warner has refused to provide open access to other content providers.

Time Warner objects to the excerpted portion of Mr. Huddleston's testimony as unresponsive to the question and not relevant to the issues in this docket.

The Applicant and Joint Petitioners assert that Mr. Huddleston's response relates to Time Warner's intent and should remain in the record if intent is considered in these proceedings. Time Warner responds that the issue of open access to a cable network should not be included in these proceedings and also that the issue of the proposed AOL/Time Warner merger was inappropriate.

The Pre-Hearing Officer finds that the excerpted portion of Mr. Huddleston's testimony is not responsive to the question, lacks foundation and is not material to the issues in this matter. **The Pre-Hearing Officer grants Time Warner's objection and strikes the excerpted testimony.**

Any party aggrieved by the decision of the Pre-Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority.

Done and Ordered this 28th day of April, 2000.

J. Richard Collier
J. Richard Collier
Pre-Hearing Officer

ATTEST:

K. David Waddell
K. David Waddell, Executive Secretary